

January/February 2004

Municipal Lawyer

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Avoiding a Wipeout

— by Gerard Lavery Lederer —

Protecting Your Clients from the Internet Tax Freedom Act

Since the invention of the telephone, municipal attorneys have been forced to defend against telephone companies' efforts to reduce payments to local governments for the right to do business in their community, including the right to use the public rights-of-way.¹ Today, in the name of enhanced "surfing" of the Internet, the communications industry² is actively promoting two bills, H.R. 49, the Internet Tax Nondiscrimination Act, and S. 150, the Internet Tax Nondiscrimination Act of 2003.³ These companion bills would cause state and local governments to "wipe-out" when it comes to collecting traditional taxes on telecommunications services used to access the Internet.

The threat to state and local governments contained in H.R. 49/S. 150 is the largest threat local governments will face in 2003-4. The seemingly innocuous change in the definition of "access services" to include telecommunications services could cost state and local government approximately \$9 billion a year by 2006.⁴ This article will outline and explain the threat, and offer suggested actions IMLA members might take or, in the alternative, encourage their clients to take.⁵

The Threat

The industry and its congressional champions seek to make permanent the ban on state and local taxation on Internet access provided by the Internet Tax Freedom Act (ITFA).⁶ They also seek to expand the definition of "Internet access service"⁷ to include "telecommunications services to the extent such services are used to provide access to the Internet."⁸ The effort to expand the ITFA built like a wave in the late summer of 2003 and appeared

unstoppable. H.R. 49 was passed in the House of Representatives by unanimous consent on July 17, 2003; on July 31, 2003, the Senate Committee on Commerce, Science and Transportation approved S. 150, the Senate counterpart to H.R. 49. It is only because of the leadership of Senators Lamar Alexander (R-TN), Thomas Carper (D-DE), and George Voinovich (R-OH), and the tireless efforts of TeleCommUnity, the

article does not offer a "one size fits all" response, but reviews a number of questions which should assist IMLA members, and their local government clients, in taking appropriate steps to protect themselves. At a minimum, however, IMLA members should counsel their clients that this may be their last opportunity to enact taxes on services that provide access to the Internet. If past is prologue, there is a strong likelihood

The threat to state and local governments contained in H.R. 49/S. 150 is the largest threat local governments will face in 2003-4. The seemingly innocuous change in the definition of "access services" to include telecommunications services could cost state and local government approximately \$9 billion a year by 2006.

National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, and IMLA, that Congress adjourned before the bill could become law.

Avoiding a Wipeout

Speculating on legislative outcomes is a risky endeavor. Still, it is not likely that Congress will complete work on the legislation, if at all, before April. IMLA members, therefore, have the rare opportunity to anticipate legislation and litigation and to suggest corrective actions to clients.⁹ These preemptive and corrective actions could also prove to be helpful in responding to the Ninth Circuit Court of Appeals' clarification that cable modem services include a telecommunications service.¹⁰ Because no jurisdiction will address this challenge from the same position, this ar-

that, should Congress renew the ITFA, it will grandfather existing taxes on Internet access, or provide a transition period for such taxes to be collected.¹¹

Grandfathered States

The ITFA permits states that charged taxes on Internet access prior to October 1, 1998, to continue charging such taxes.¹² According to the Congressional Budget Office (CBO) there are eleven states which meet this status and stand to lose \$80 to \$120 million should their exemption be eliminated.¹³ The CBO does not estimate how much these states could lose if the definition of Internet access is modified to include telecommunications services, except to indicate that it could be substantial revenue.¹⁴

If your state has been grandfathered, the good news is that you need not seek legislation to provide for the authority to tax Internet access

or telecommunications services employed to access the Internet. The bad news is that your clients have more at stake in this debate than non-grandfathered states, because they are already dependent on these revenues. You should check to ensure that your client has the right, under state law, to tax telecommunications services and that it has an ordinance in place. You should also make sure that the members of your congressional delegation are aware of these potential revenue losses should your state lose its grandfathered status.

Does Your State Permit Taxation of DSL?

Because the ITFA specifically excluded telecommunications services from those services that are exempt from taxation, many local governments may be collecting taxes from telecommunication services used to access the Internet. Telecommunications services used to access the Internet include everything from traditional dial-up services over twisted copper lines to digital subscriber lines (DSL) provided over fiber optic cables. The array of taxes potentially impacted by the legislation includes sales and gross receipts taxes, corporate income taxes, and property taxes. Recent reports indicate that 27 states and the District of Columbia are imposing sales and/or excise taxes on DSL service.¹⁵

If your client is in a state that already taxes the telecommunications component of DSL, it appears that, should any definitional change in Internet access be made, there is a good chance of preserving that tax revenue, at least for a number of years.¹⁶ Like the grandfathered states, however, the chances of being held harmless improve greatly if you educate and motivate your congressional delegation to protect that status.

It would also be prudent to examine whether DSL providers in your state have already given themselves a tax break with an aggressive reading of the ITFA to include the telecommunications portion of DSL. Such aggressive interpretations of the ITFA were revealed in a paper circulated to Missouri legislators in support of H.R. 49/S. 150:

According to an informal survey of four major telecommunications services providers conducted by the Missouri Chamber of Commerce and Industry, only one of the four currently charge their customers sales taxes on Digital Subscriber Lines (DSL). Most companies view amounts paid for DSL as amounts paid for access to the Internet and do not charge sales tax because of the current prohibition against state and local taxation of Internet access.¹⁷

If your client is in a state that enjoys neither the grandfathered status under the ITFA, nor taxes the telecommunications component of DSL, your client must act or face a self-inflicted wipeout.

Non-Grandfathered States

If your client is in a state that enjoys neither the grandfathered status under the ITFA, nor taxes the telecommunications component of DSL, your client must act or face a self-inflicted wipeout.

Reveal Risk of Loss: IMLA members should make clear to their clients that there is a distinct possibility that absent action to enact an ordinance, or if need be, a state statute to tax the telecommunications component of DSL or similar services, the ability to capture such revenues in the future may be forfeited. Even if the client and/or state does adopt such a tax policy, it may prove to be too late, as the leading pro-

posal for amending the ITFA would have frozen such taxes in place as of November 6, 2003.¹⁸

Not All Localities Have the Same Authority: The decision to tax telecommunications services or to authorize local governments to tax or subject such services to a franchise fee is one reserved to the states.¹⁹ There are as many permutations on what grant of authority a state has delegated to its local governments as there are states.²⁰ Before proceeding, it would be wise to research the level of authority delegated to your client with respect to taxing telecommunications services provided by a cable operator or telecommunications provider.

Conclusion

While many in the industry would like to minimize the impact of such a nominal definitional change, according to the Multi-State Tax Commission, the change will result in a loss of revenue to state and local governments of up to \$8.75 billion annually by 2006.²¹ Each \$1 billion in lost revenues represents cuts for local governments of, for example:

- 20,000 police officers;
- 20,000 firefighters; or
- 25,000 teachers.²²

It is imperative that IMLA members guide their clients' actions in these months of opportunity to avoid a wipeout of their authority. (Note: While Congress failed to extend or expand the scope of the Internet Tax Freedom Act [ITFA] before adjourning *sine die* the 1st Session of the 108th Congress, it is very likely that by the time you are reading

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this article, an agreement will be reached to extend the tax moratorium. There may even be an agreement to address the status of grandfathered state taxes and the definition of what constitutes internet access. An update on the legislative efforts to extend and expand the ITFA is posted at <http://www.miller-vaneaton.com/ITFA.html>.)

Notes

1. The battle over right-of-way fees dates back to *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893). The battle over business taxes was addressed by the Supreme Court the following year in *Postal Telegraph Cable Co. v. City Council of Charleston*, 153 U.S. 692 (1894). For a comprehensive review of rights-of-way compensation, see Frederick Ellrod & Nicholas Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 SEATTLE U. L. REV. 475 (2003) and William Malone, *Municipalities' Right to Full Compensation for Telecommunications Providers' Uses of the Public Rights-of-Way*, 107 DICK. L. REV. 623 (2003).

2. The National Cable and Telecommunications Association (NCTA) and many Internet service providers have joined the telecommunications lobby. Much of the involvement of the NCTA may be attributed to the decision of the U.S. Court of Appeals for the Ninth Circuit that cable modem service includes a telecommunications component: *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

3. Internet Tax Nondiscrimination Act, H.R. 49, 108th Cong. (2003) and Internet Tax Nondiscrimination Act of 2003, S. 150, 108th Cong. (2003). Legislative histories, conference reports, committee bills and the various iterations of a bill may be found at <http://www.thomas.gov>.

4. "Based on the best available information, H.R. 49—by preempting a variety of activities that go beyond access by customers to the Internet and by expanding the scope of the preemption to income, property and other business taxes—will reduce revenues from current taxes levied by the 50 states, the District of Columbia and local governments a minimum of \$4 billion and up to \$8.75 billion annually by 2006." Dan Bucks, Elliot Dubin, and Ken Beier, *Revenue Impact on State and Local Governments of Permanent Extension of the Internet Tax Freedom Act*, Multistate Tax Commission report (September 24, 2003) at <http://www.mtc.gov/ITFA.htm> (hereinafter "MTC report").

5. This article addresses only the ban on taxing Internet access. The issue of taxing remote sales

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APPENDIX

Existing, now expired, law is in plain text. The proposed language of S. 150, as amended by Senate on November 6, 2003 (see Congressional Record of November 6, 2003 at S. 14157) is shown in italics and suggested deletions are shown with a strike-through.

SEC. 1101. MORATORIUM.

(a) MORATORIUM—No State or political subdivision thereof shall impose any of the following taxes ~~during the period beginning on October 1, 1998, and ending on November 1, 2003~~

(1) taxes on Internet access, ~~unless such tax was generally imposed and actually enforced prior to October 1, 1998, and~~

(2) multiple or discriminatory taxes on electronic commerce.

* * * * *

~~(d) DEFINITION OF GENERALLY IMPOSED AND ACTUALLY ENFORCED—~~ For purposes of this section, a tax has been generally imposed and actually enforced prior to October 1, 1998, if, before that date, the tax was authorized by statute and either—

1) a provider of Internet access services had a reasonable opportunity to know by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or

* * * * *

SEC. 1104. DEFINITIONS.

For the purposes of this title:

(1) * * *

(2) DISCRIMINATORY TAX—The term 'discriminatory tax' means—

(A) * * *

(B) any tax imposed by a State or political subdivision thereof, if—

(i)

~~except with respect to a tax (on Internet access) that was generally imposed and actually enforced prior to October 1, 1998, the sole ability to access a site on a remote seller's out-of-State computer server is considered a factor in determining a remote seller's tax collection obligation; or~~

~~2) a State or political subdivision thereof generally collected such tax on charges for Internet access.~~

(e) EXCEPTION TO MORATORIUM—

(1) * * *

* * * * *

(3) DEFINITIONS—In this subsection:

(A) * * *

* * * * *

(D) INTERNET ACCESS SERVICE—The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services, **except to the extent such services are used to provide Internet access.**

* * * * *

(5) INTERNET ACCESS—The term 'Internet access' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. Such term does not include telecommunications services, *except to the extent such services are used to provide Internet access.*

* * * * *

(10) TAX ON INTERNET ACCESS—The term 'tax on Internet access' means a tax on Internet access, including the enforcement or application of any new or preexisting tax on the sale or use of Internet services ~~unless such tax was generally imposed and actually enforced prior to October 1, 1998.~~

WIPEOUT

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over the Internet, while important to the local government, is being addressed in separate legislation. Unlike the issue of remote sales, there is no nexus question presented here as the impacted carriers are using the community's rights-of-way to provide access. See *Quill Corp. v. North Dakota*, By and Through Heitkamp, 504 U.S. 298 (1992).

6. Internet Tax Freedom Act, 47 U.S.C. § 151, Section 1104 *et. seq.* (1998). It imposed a three-year moratorium on state and local government taxes on Internet access, as well as on any multiple or discriminatory state and local taxes on Internet-based transactions. Despite lapsing for a month, Congress extended the ITFA for approximately two additional years or through November 1, 2003. (See Internet Tax Nondiscrimination Act, Pub. L. No. 107-075).

7. "(D) Internet access service.—The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services." 47 U.S.C. §151 Section 1104.

8. "Under existing law, telecommunication services were excluded from the definition of Internet access and thus not within the scope of the preemption of state and local taxes. Under the current language of H.R. 49, telecommunications would benefit from the tax preemption to the extent that they provide Internet access....all telecommunications will eventually qualify as Internet access as they become a service offered over the Internet. When that point is reached—and the transition is unfolding rapidly—telecommunications will be exempt from all major state and local taxes." MTC report,

supra note 4 at 2 (see the Appendix on p. 20 for the full text of the proposed changes).

9. The Supreme Court has sustained the right of state and local governments to require sales taxes on intra- and interstate telecommunications services provided within states and communities. See *Goldberg v. Sweet*, 488 U.S. 252 (1989). There is, however, very little case law on the ITFA: *City of Chicago v. AT&T Broadband, Inc.*, 2003 WL 22057905 at *4 (N.D. Ill., Sept. 4, 2003) (the imposition of a discriminatory tax on cable would violate the Internet Tax Freedom Act; the ITFA expressly prohibits discriminatory additional taxes or fees imposed on Internet); *Thomas v. Network Solutions, Inc.*, 176 F.3d 500 (D.C. Cir. 1999) (ITFA does not provide a shield against assessment); *Stomp, Inc. v. NeatO, LLC*, 61 F.Supp. 2d 1074 (C.D. Cal. 1999) (a federal policy, ITFA, has emerged which seeks to promote the Internet as a tool for communication and trade); and *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

10. IMLA (as part of the ALOAP coalition, the Alliance of Local Government Officials Against Preemption), as well as the FCC, have filed a petition for review en banc of the Ninth Circuit's opinion in *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120 (9th Cir. 2003).

11. A November 6, 2003 amendment circulated by Senators Alexander & Carper provided: "[The ban on DSL taxes] shall not apply until November 2, 2005, with respect to a law imposing a tax that was generally imposed and actually enforced prior to November 6, 2003." The amendment was never filed formally. The proposed amendment is referenced at S. 14162 (November 5, 2003) of the Congressional Record and is available at <http://www.telecommunityalliance.org/images/S150carperalexander.pdf>.

12. "No State or political subdivision thereof shall impose any...taxes on Internet access, unless such tax was generally imposed and actu-

ally enforced prior to October 1, 1998." (47 U.S.C. § 151, Section 1101 (a)(1)).

13. These states are: Colorado, Hawaii, New Hampshire, New Mexico, North Dakota, Ohio, South Dakota, Tennessee, Texas, Washington, and Wisconsin.

14. H.R. Rep. 108-234 at 13 (2003).

15. See Michael Mazerov, *Making the Internet Tax Freedom Act Permanent in the Form Currently Proposed would lead to a Substantial Revenue Loss for States and Localities*, Center on Budget and Policy Priorities (Oct. 20, 2003) at 2, at <http://www.cbpp.org/10-20-03sfp.htm>. In addition to the District of Columbia, the states are: Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Washington, and Wisconsin.

16. See *supra* note 11.

17. Ray McCarty, *S.150 and H.R. 49: Impact on Missouri State and Local Government Revenues*, October 22, 2003 at 3.

18. See *supra* note 11.

19. It is a well-established rule of law in most states that municipalities are creatures of the state and derive their powers solely from the Legislature. See, e.g., *Wagner v. Mayor and Municipal Council of Newark*, 132 A.2d 794 (N.J. 1957); WYO. STAT. ANN. § 15-1-103(a)(xi) (1999).

20. See the National Telecommunications and Information Administration (NTIA) survey of all 50 states and the District of Columbia on key rights-of-way laws as they pertain to telecommunications providers at <http://www.ntia.doc.gov/ntiahome/staterow/rowtableexcel.htm>.

21. Dan Bucks, Elliott Dubin, and Ken Beier, *Revenue Impact on State and Local Governments of Permanent Extension of the Internet Tax Freedom Act*, Multistate Tax Commission report (September 24, 2003) at <http://www.mtc.gov/ITFA.htm>.

22. *Id.* **M**

SPORTS ARENA

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tion for the accomplishment of public purposes only." N.C. Const. art. I § 32; art. V, § 2(7) (1970).

7. *Shinn*, 533 S.E. 2d 842.

8. *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996).

9. The North Carolina Supreme Court has long held that the erection and operation of a public auditorium serves a public purpose. See *Adams v. City of Durham*, 126 S.E. 611 (N.C. 1925); *City of Greensboro v. Smith*, 85 S.E.2d 292 (N.C. 1955).

10. *Id.*

11. We note a certain degree of irony in that, as noted above, one of the most publicly outspoken opponents of the deal is a former city council member who has been a champion of privatization of governmental services. See, e.g., Clint Bolick, *Entrepreneurship in Charlotte: Strong Spirit, Serious Barriers*, The Institute For Justice, (undated) at http://www.ij.org/publications/city_study/CitStud_Charl_rep.html.

12. N.C. GEN. STAT. § 160A-20.1 (2003) ("A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in").

13. North Carolina courts will not second-

guess municipal contracting decisions in the absence of fraud or a palpable abuse of discretion. See *Mullen v. Town of Louisburg*, 33 S.E.2d 484 (N.C. 1945).

14. Since a very visible hole for the arena has been dug, and the debt issued, we are confident that we also now have a viable laches defense. See *Cannon v. City of Durham*, 463 S.E.2d 272 (N.C. Ct. App. 1995).

15. The CSL International Web site is at <http://www.csintl.com/index.html>.

16. The Kennedy, Covington, Lobdell & Hickman Web site is at <http://www.kennedycovington.com>.

17. The Parker, Poe, Adams & Bernstein Web site is at <http://www.parkerpoe.com>. **M**

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